

**Board of Vocational Nursing and Psychiatric Technicians
Department of Consumer Affairs**

INITIAL STATEMENT OF REASONS

HEARING DATE: May 11, 2011

SUBJECT MATTER OF PROPOSED REGULATIONS: Enforcement

SECTIONS AFFECTED: Amend Title 16, Division 25, of the California Code of Regulations as follows:

Vocational Nursing (VN): Amend sections 2503, 2524.5
Add sections 2509, 2518.8, 2524.1
ReNUMBER section 2524.1 to section 2524.5

Psychiatric Technician (PT): Amend sections 2563, 2579.20
Add sections 2568, 2576.8, 2579.11
ReNUMBER section 2579.11 to section 2579.20

INTRODUCTION:

The Board of Vocational Nursing and Psychiatric Technician's (Board) highest priority is protection of California consumers. Business and Professions (B&P) Code sections 2841.1 (VN) and 4501.1 (PT) mandate that the protection of the public shall be the highest priority of the Board in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

The Board is authorized to investigate the criminal conviction history of applicants and licensees, subsequent arrests, allegations of unprofessional conduct, and unsafe or incompetent practice by licensed vocational nurses and psychiatric technicians. The Board is authorized to **investigate and** discipline licensees and applicants who may jeopardize the health, safety and welfare of the consumer.

In 2009, various media articles reported that most Department of Consumer Affairs (DCA) health care boards were taking over three years to complete investigations and take appropriate disciplinary actions against licensees. Most health care boards face significant complaint investigation backlogs and processing delays.

The DCA reviewed the existing enforcement process and found systemic problems that limit the boards' abilities to investigate and act on cases in a timely manner. These problems range from legal and procedural challenges to inadequate resources. In response, the DCA launched the Consumer Protection Enforcement Initiative (CPEI) to overhaul the enforcement process at the healing arts boards and reduce the average enforcement completion timeline to between 12-18 months.

The proposed regulatory action will enhance consumer protection and facilitate achievement of the Board's goal to reduce the time it takes to investigate and act on cases.

Specific Changes and Factual Basis/Rational:

Amend Sections 2503 (VN) and 2563 (PT)

The regulatory amendment delegates to the Board's Executive Officer (EO) the authority to approve settlement agreements for revocation, surrender, or interim suspension of a VN or PT license.

Under existing law, the Board has delegated to the EO specific duties, relative to disciplinary matters, ~~including~~ receiving and filing accusations and notices of defense, and issuing subpoenas. The Board has traditionally retained for itself the authority to render decisions on proposed decisions prepared by administrative law judges (ALJ) and settlement agreements entered into by deputy attorneys general (DAG) and the licensee or applicant with the approval of Board staff. The ALJ's proposed decision is issued after a licensee has had an opportunity to dispute the charges at an administrative hearing. The licensee and DAG, with approval of Board staff, may and often do negotiate a settlement agreement to resolve the case prior to the hearing. In a settlement agreement, the licensee usually admits specific charges and agrees to ~~the~~ a proposed disciplinary action. Board members then must vote to approve proposed decisions and settlement agreements.

The regulatory proposal would enable the Board's EO to approve settlement agreements for license revocation, interim suspension, or voluntary surrender of the VN or PT license. Because the licensee willingly and voluntarily admits to the charges and agrees to a proposed disciplinary action that is ~~among~~ the severest the Board can impose in that proceeding, there is little discretion for the Board's EO to exercise in these cases.

Delegating to the Board's EO the authority to approve settlement agreements, if the agreed upon action is license revocation, surrender or interim suspension, will reduce processing times and improve consumer protection by allowing orders to become effective in a more timely manner.

Add Sections 2509 (VN) and 2568 (PT)

This proposed regulatory action requires an applicant for a VN or PT license to undergo an evaluation and/or examination if it appears the applicant may be unable to practice due to mental and/or physical illness. The Board is required to pay for the examination and the evaluation reports must be made available to the applicant. Failure to comply with the requirement will render the application incomplete. Additionally, if after receiving the evaluation report the Board determines that the applicant is unable to practice safely, the Board may deny the application.

Pursuant to B&P Code Section 820, the Board can compel a licensee to submit to physical or mental health examination if the licensee's ability to practice in a competent manner may be impaired due to physical or mental illness. The Board is also authorized to deny a license for any act that would warrant discipline if done by a licensee. Rather than license someone, then order a psychological or medical evaluation, this regulation would permit the board to obtain the evaluation prior to licensure. The authority to compel a psychological or physical examination for an applicant for licensure would augment the Board's ability to protect the public, given the potential harm to public safety presented by a licensee whose competency to practice is impaired due to mental or physical illness.

Add Sections 2518.8 (VN) and 2576.8 (PT)

B&P Code Sections 2878(a) (VN) and 4521(a) (PT) define acts that constitute unprofessional conduct. This regulatory proposal specifies additional acts that constitute unprofessional conduct as follows:

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1. In a civil settlement agreement, including or permitting to be included provisions prohibiting a party in the dispute from contacting, cooperating with, or filing a complaint with the Board, or requiring another party to the dispute to attempt to withdraw any complaint filed with the Board.

These actions can delay and thwart the Board's efforts to investigate possible misconduct, thereby preventing the Board from protecting the public. The use of such provisions attempts to deny consumers their rights to file complaints; inhibits the Board in fulfilling its mandate to investigate complaints and take disciplinary action; and ultimately, places consumers at risk.

It has been argued by some that subjecting a licensee to review by a board after a civil settlement has been reached constitutes double jeopardy. The Board points out that the United States Supreme Court has ruled that the protection offered by double jeopardy only applies to repeated criminal proceedings. Double jeopardy protection does not attach to civil proceedings or subsequent administrative proceedings. Criminal, civil, and administrative proceedings each serve entirely different legal functions.

The Board's mandate is consumer protection of all consumers. It cannot investigate what it does not know about, and cannot determine if a license should be disciplined without investigating.

2. Failure to provide to the Board lawfully requested documents under the licensee's control, within the specified timeframe.

During its investigations, the Board frequently encounters difficulty in obtaining pertinent and legally requested documents or records. When a licensee has control over the requested items, it is necessary and appropriate that the Board be provided the documents or records so that the investigation can be conducted in a timely manner. Defining failure to provide the documents or records as unprofessional conduct and grounds for Board disciplinary action will facilitate and expedite obtaining records.

3. Failure to cooperate and participate in any Board investigation, as long as such action does not infringe upon the licensee's constitutional or statutory privileges.

As with failure to produce documents, the failure to participate or cooperate in the investigation impedes and delays the investigative process and erodes the Board's public protection mandate. As provided for in its text, the proposal would not deprive the licensee of any constitutionally or statutorily guaranteed privileges or rights.

4. Failure of a licensee to notify the Board within the specified timeframe of felony charges or indictment, arrest, conviction, or disciplinary action by another licensing entity.

As part of the licensing process, all applicants for VN or PT licensure are fingerprinted for purposes of conducting criminal history background checks through the California Department of Justice (DOJ) and Federal Bureau of Investigation (FBI). In most cases, the Board receives subsequent arrest and conviction reports from DOJ. The Board does not receive these reports directly from the FBI, but proposes to in the future. The Board also requires that licensees report discipline of healthcare professional licenses by any government agency; any convictions, with specified exceptions, at the time of license renewal; and the Board obtains information regarding disciplinary action against a licensee taken by another state. However, the Board does not always receive subsequent arrests and conviction records in a timely manner and the self-reporting requirement is every two years, resulting in a potential significant delay in Board awareness of the arrest, conviction, or license discipline. Requiring licensees to report the required information will provide the Board with an additional and timelier resource for information. The more timely the information is received, the timelier any discipline can be, which better protects California consumers.

5. Failure to comply with a court ordered subpoena to release records.

Failure or refusal to comply with a court order mandating the release of records to the Board has an adverse impact upon the Board's ability to conduct investigations in a timely manner. Making this a violation creates an incentive for licensees to cooperate. Delays in the investigative process place consumers at risk.

Renumber and Amend Sections 2524.1 (VN) to 2524.5 and 2579.11 (PT) to 2579.20

The proposed regulatory action will clean up language to clarify that the Board will disclose consumer complaint information or provide a copy of disciplinary documents upon any request from the public, rather than only "written" requests. Additionally, the proposed regulatory action will renumber section 2524.1 (VN) and 2579.11 (PT) for organizational purposes.

Add New Sections 2524.1 (VN) and 2579.11 (PT)

The proposed regulatory action specifies that the Board will deny or revoke a license if an individual is required to register as a sex offender pursuant to Penal Code (PC) Section 290. The Board will also deny any petition to reinstate or reissue a license if the licensee is a registered sex offender, except under specified conditions. Those conditions are: 1) An individual who has been relieved under PC Section 290.5 of his or her duty to register as a sex offender or whose duty to register has been formally terminated; 2) An individual who is required to register as a sex offender pursuant to PC Section 290 solely because of a misdemeanor conviction under Section 314 of the PC. Nothing in the proposed regulation shall prohibit the Board from exercising its discretion to discipline a licensee under any other provision of State law based upon the licensee's conviction under Section 314 of the PC.

Because of the seriousness of sex offenses and sexual misconduct and the potential threat to consumers that sex offenders pose, the Board proposes to deny licensure of applicants and to revoke VN and PT licenses in any disciplinary matter where there is a finding that the applicant or licensee was convicted of a sex offense that requires registration as a sex offender.

The regulatory proposal interprets and makes specific B&P Code Section 2878.7(e) (VN) and 4524(e) (PT) which prohibits LVNs or PTs whose licenses have been revoked and who are subject to an order of registration pursuant to Penal Code Section 290 from petitioning the Board for reinstatement of the license. Additionally, this proposal provides consistency by imposing the same disciplinary action for applicants (including reinstatement applicants) for licensure and all other licensees who are required to register as sex offenders. ~~This proposed regulation would utilize the same definition of sex offense that is used in the Education Code to apply to teachers.~~

UNDERLYING DATA:

- 1) The DCA Consumer Protection Enforcement Initiative (January 21, 2010).
- 2) Minutes of the September 16, 2010, Board Meeting and Board Meeting Report.

BUSINESS IMPACT

The regulations will not have a significant adverse economic impact on businesses. The regulations only impact licensed vocational nurses, psychiatric technicians, and applicants for licensure.

SPECIFIC TECHNOLOGIES OR EQUIPMENT

The regulatory proposal does not mandate the use of special technologies or equipment.

CONSIDERATION OF ALTERNATIVES

No reasonable alternative to the regulations would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulations.

Set forth below are the alternatives which were considered and the reasons each alternative was rejected:

1. Not adopt the regulations. This alternative was rejected because the regulatory proposal is based on internal and external reviews of the enforcement process and is necessary to improve the Board's enforcement operations.
2. Adopt regulations. The Board determined that this alternative is the most feasible because the regulatory proposal will enhance consumer protection by reducing the time it takes for the Board to take disciplinary action.

(3/15/11)